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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/523,973

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HOFFMAN WASSON & GITLER, P.C  
CRYSTAL CENTER 2, SUITE 522  
2461 SOUTH CLARK STREET  
ARLINGTON, VA 22202-3843

EXAMINER

MCKANE, ELIZABETH L

ART UNIT

PAPER NUMBER

1744

MAIL DATE

DELIVERY MODE

08/08/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

Application No.

10/523,973

Applicant(s)

REECE, CRALE

Examiner

Leigh McKane

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1744

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 09 May 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,4-7,11-19,21 and 22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-7,11-17,21 and 22 is/are rejected.
- 7) ☒ Claim(s) 18 and 19 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 February 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1, 6, 7, 11, 12, 17, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Hoppe (US 4,549,960).

Hoppe teaches an apparatus having an enclosure **107** “adapted to” contain a vaporizing device (fumigant) **C**, an inlet and outlet to allow air to pass in and out of the enclosure, a fan **50** to pass the air from the inlet through the enclosure and through the outlet. The fan **49** is located in a second enclosure **48** separate from the enclosure **107** and having a shroud **48a**. The intake area **55** of the fan is shown to be “adjacent” the inlet of the enclosure, such that fumigant laden air does not pass through the fan. See Figures 10 and 11. A perforated hose **75** extends from the enclosure and is attached to the outlet and through which the fumigant passes. See col.8, line 60 to col.9, line 1. Furthermore, as shown in Figure 8, a wall of the apparatus at **50** is provided with a power socket power supply **90** to provide electrical power to fan. See col.7, lines 9-21. The fumigant, aluminum phosphide, intrinsically emits a fragrance (odor). As to the intended use of the enclosure and apparatus, intended use has been continuously held not to be germane to determining the patentability of the apparatus, *In re Finsterwalder*, 168 USPQ 530. In use, the perforated hose is “placed” about an area to be fumigated, a fumigant placed within the

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enclosure, and the fan is powered to push air through the enclosure, entraining fumigant in the air to be passed through the perforated hose.

3. Claims 1 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Smith (US 3,727,345).

Smith discloses an apparatus having a main enclosure **11** "adapted to" contain a vaporizing device **16**, an inlet and outlet to allow air to pass in and out of the enclosure, a fan **12** to pass the air from the inlet through the enclosure and through the outlet. See Figures 1 and 4. A perforated hose **10** extends from the enclosure **11** and is attached to the outlet and through which the fumigant passes. See col.3, lines 35-41. As to the intended use of the enclosure and apparatus, intended use has been continuously held not to be germane to determining the patentability of the apparatus, *In re Finsterwalder*, 168 USPQ 530. In use, fumigant is placed in vaporizer **16** and the fan operated to disseminate the vapors through holes in perforated hose **10**.

#### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 14-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hoppe.

With respect to claims 14-16, and the particular fumigant material held within the enclosure during use, “[e]xpression relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus claim.” *Ex parte Thibault*, 164 USPQ 666,667 (Bd. App. 1969). Furthermore, “[i]nclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims.” *In re Young*, 75 F.2d 996, 25 USPQ 69 (CCPA 1935) (as restated in *In re Otto*, 312 F.2d 937, 136 USPQ 458, 459 (CCPA 1963).

6. Claims 4, 5, 12-16, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith.

As to claims 4 and 5, while Smith is silent with respect to a door into the enclosure **11**, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide one as a means to replace the supply of fumigant, service the heater **17** and replace the air filter **18**.

With respect to claims 12 and 13, although Smith is silent with respect to a power socket, it is evident to one of ordinary skill in the art that a source of power is need and that the most obvious location would be an attachment in to the enclosure adjacent the fan and heater.

As to claims 14-16, and the particular fumigant material held within the enclosure during use, “[e]xpression relating the apparatus to contents thereof during an intended operation are of no significance in determining patentability of the apparatus claim.” *Ex parte Thibault*, 164 USPQ 666,667 (Bd. App. 1969). Furthermore, “[i]nclusion of material or article worked upon by a structure being claimed does not impart patentability to the claims.” *In re Young*, 75 F.2d

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\*>996<, 25 USPQ 69 (CCPA 1935) (as restated in *In re Otto*, 312 F.2d 937, 136 USPQ 458, 459 (CCPA 1963).

With respect to claim 21 and the length of the flexible hose, it has been held that such a limitation is not patentably significant since it at most relates to the size of the article under consideration which is not ordinarily a matter of invention. *In re Yount*, 36 CCPA (Patents) 775, 171 F.2d 317, 80 USPQ 141.

#### ***Allowable Subject Matter***

7. Claims 18 and 19 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

8. The following is a statement of reasons for the indication of allowable subject matter: As to claims 18 and 19, both Hoppe and Smith fail to teach or suggest an outlet of the enclosure which is associated with a venturi.

#### ***Response to Arguments***

9. Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

10. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leigh McKane whose telephone number is 571-272-1275. The examiner can normally be reached on Monday-Friday (5:30 am-2:00 pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gladys Corcoran can be reached on 571-272-1214. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



**Leigh McKane**  
**Primary Examiner**  
**Art Unit 1744**

elm  
5 August 2007